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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-884

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

MAX J. GORDON,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT

OF

THE UNITED STATES

UNITED STATES OF AMERICA)

Plaintiff-Respondent)

v.)

MAX J. GORDON)

Defendant-Petitioner)

PETITION FOR WRIT OF CERTIORARI

(a) NO OPINIONS WERE WRITTEN OR DELIVERED IN THE COURTS BELOW WITH RESPECT TO THE DECISIONS.

(b) JURISDICTION OF THIS COURT IS INVOKED UPON THE FOLLOWING GROUNDS:

(i) The judgment sought to be reviewed is the judgment of the United States Court of Appeals for the Second Circuit dated and entered November 16, 1972.

(ii) There is no order with respect to rehearing or extension of time to petition for certiorari.

(iii) Jurisdiction of this court to review the judgment in question by writ of certiorari is conferred by Title 28 of the United States Code Section 1254 Subdivision 1.

(c) THE QUESTION PRESENTED FOR REVIEW

The sole question presented by this petition is: Can a person be guilty of the felony of violating Section 2231 of Title 18 of the United States Code by interfering with a person executing a search warrant if the accused has no intention of opposing, impeding or interfering with the search?

The defendant petitioner herein, clad in pajamas, opened the door of an apartment of a woman tenant to whom he was not related. Standing outside were the apartment superintendent and four officers armed with a search warrant. Defendant rushed out, trying to dodge or slip by them but bumping into them and pushing one of them against the wall of the hall before he was handcuffed.

The trial Judge charged the jury that there were only two necessary elements of proof of the crime: first, that the defendant forcibly opposed or impeded, etc., the agents, and second, that they were engaged in performing their official duties. The Judge did not require that the jury find that the defendant intended to impede the search or that he intended to impede the officers in entering and searching, and the circumstances as shown by the prosecution's evidence were clearly consistent with the possibility that the defendant was simply trying to get away. The search warrant was with respect to the possibility that the apartment was used for illegal gambling but the warrant was not directed to the defendant, it was not his apartment, he was neither the tenant nor a resident, and in fact no evidence of gambling was found and there was nothing improper in the apartment, except possibly the defendant himself because he was dressed only in pajamas.

Basically, the Judge's charge was the type of charge that would support an indictment under Section 111 of Title 18 of the United States Code, interference with officers engaged in performance of their official duties. However, this indictment was not under that section but under Section 2231, which makes it a felony to interfere with persons in the course of executing search warrants only if the interference is "with regard thereto", language which is not contained in Section 111, and has no counterpart therein.

(d) THE STATUTE INVOLVED - UNITED STATES CODE, TITLE 18, SECTION 2231

"Whoever forcibly assaults, resists, opposes, prevents, impedes, intimidates, or interferes with any person authorized to serve or execute search warrants or to make searches and seizures while engaged in the performance of his duties with regard thereto or on account of the performance of such duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both". (United States Code Annotated, Title 18, page 465).

(e) STATEMENT OF THE CASE

The basis for federal jurisdiction is the alleged violation of a federal statute, Section 2231 of Title 18 of the United States Code.

On February 28, 1972, the defendant-petitioner (hereinafter called defendant) was indicted under Title 18 of the United States Code Section 2231 for resisting, etc., special agents of the Federal Bureau of Investigation in the course of executing a search warrant. Defendant moved to dismiss the indictment and on May 15th the motion was denied and the jury trial was commenced on June 5th and continued June 8th and 9th, 1972 resulting in a verdict of guilty and on July 7th the defendant was sentenced to imprisonment for six months.

The judgment was appealed to the Court of Appeals for the Second Circuit and on November 16, 1972 the judgment was affirmed without opinion.

The relevant facts are: A warrant was issued (Page 28 of Appendix to Brief, hereafter cited simply by page numbers) to search for evidence of illegal gambling in an apartment leased and occupied by one Mrs. Lambert (p. 100, 101). On New Year's Day 1972 three special agents of the Federal Bureau of Investigation and a Connecticut State Trooper accompanied the Superintendent to the door of the apartment which is at the end of a hall (p. 39); the Superintendent rang the bell and called (p. 19) and the defendant, who is not related to the tenant, Mrs. Lambert, answered the door, opened it, clad in pajamas and apparently having just awakened (p. 23-26). He opened the door part way, (p.30) one of the agents put his foot in the door (p.47) and the defendant emerged either being brought out by the agents (p.21), or trying to dodge or slip by the agents (p.49). A "scuffle" ensued thus: Defendant tried to "slip through" agents Stonko and McGorray (Stonko, p. 49), he "continued running" past them (Long, p. 81), "brushing into" Trooper Maloney's arm (Maloney, p.99), and ended up in an arm lock by Agent Long and a head lock by Trooper Maloney (Maloney, p. 99), approximately five seconds after the door was opened (Long, p. 87-88). The defendant was promptly subdued and handcuffed (P. 77-78) and the agents promptly searched the apartment without finding any indicia of gambling (p.69-71, 116-119). Agent Stonko testified that after "the initial difficulty...when Mr. Gordon first opened the door" there was no reason why the officers couldn't get into the apartment to search it (p.52-3).

(g) THE BASIS FOR FEDERAL JURISDICTION

Jurisdiction is based on an indictment for violation of Section 2231 of Title 18 of the United States Code.

(h) THE REASONS FOR ALLOWING THE WRIT

This is a question of interpretation of a federal statute of general application which this court has never passed upon. The interpretation of the courts below is clearly erroneous and contrary to a reading of the statute involved, United States Code, Title 18 Section 2231.

The record indicates that the defendant was trying to get away, not that he was trying to prevent the search of the apartment. If the jury had been required to find that the defendant's interference with the agents was "with regard to" their search, it is clearly possible, if not probable that he would have been acquitted. However, the Judge's charge stated that the crime set forth in Section 2231 included only two elements: 1. interference with the agents, and 2. that they were engaged in the performance of their duty of executing the warrant.

By eliminating the requirement that the interference must be, as the statute requires "with regard to" the search, the court clearly created a new felony which Congress never enacted.

The error is clearly shown by a comparison of Section 111 and Section 2231 which are substantially similar but differ in certain respects, Section 111 referring to certain public officers (principally police) and Section 2231 covering assaults and interference with persons authorized to execute search warrants.

The two sections read:

Section 111	Section 2231
(a)	(a)
Whoever forcibly assaults resists, opposes, impedes, intimidates, or interferes with	Whoever forcibly assaults resists, opposes, prevents, impedes, intimidates, or interferes with
(b)	(b)
any person designated in Section 1114 of this title	any person authorized to serve or execute search warrants or to make searches and seizures
(c)	(c)
while engaged in or on account of the performance of his official duties	while engaged in the performance of his duties with regard thereto or on account of the performance of such duties
(d)	(d)
shall be fined not more than $5,000 or imprisoned not more than three years, or both.	shall be fined not more than $5,000 or imprisoned not more than three years, or both.

(underscoring supplied)

It will be seen from the above that if either a policeman or a person executing a search warrant is at any time assaulted because they had performed their police duties or search duties this would be feloneous even though the assault occurred long afterwards. That situation is covered by the words in each section "on account of" such performance. Furthermore, under Section 111 any assault or interference with a policeman while engaged in his duties is a crime even though the assault or interference is not directed against the policeman's performance of police duties. However, Congress clearly restricted the felony of interfering with

persons executing search warrants to assaults or interference "with regard thereto". The courts below completely disregarded this statutory language in the instant case. The judgment below, therefore, improperly created a felony which Congress never created.

This court should not permit the creation of a new crime by judicial fiat or inadvertance.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For The
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November, one thousand nine hundred and seventy-two.

Present: HON. J. JOSEPH SMITH
HON. IRVING R. KAUFMAN
HON. WILLIAM H. MULLIGAN
Circuit Judges,

United States of America,	:	
Plaintiff-Appellee,	:	72-1962
v.	:	
Max J. Gordon,	:	
Defendant-Appellant.	:	

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
FILED, NOVEMBER 16, 1972
A. DANIEL FUSARO, CLERK Cal. No. 360